

# **WEST VIRGINIA PUBLIC EMPLOYEES GRIEVANCE BOARD**

## **SYNOPSIS REPORT**

### **Decisions Issued in January, 2021**

The Board's monthly reports are intended to assist public employers covered by a grievance procedure to monitor significant personnel-related matters which came before the Grievance Board, and to ascertain whether any personnel policies need to be reviewed, revised or enforced. W. Va. Code §18-29-11(1992). Each report contains summaries of all decisions issued during the immediately preceding month.

If you have any comments or suggestions about the monthly report, please send an e-mail to [wvgb@wv.gov](mailto:wvgb@wv.gov).

NOTICE: These synopses in no way constitute an official opinion or comment by the Grievance Board or its administrative law judges on the holdings in the cases. They are intended to serve as an information and research tool only.

**TOPICAL INDEX**  
**HIGHER EDUCATION EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Retaliation; Oral Warning; Misconduct; Inappropriate Language
<b><u>CASE STYLE:</u></b>	<u>Holley v. Marshall University</u> DOCKET NO. 2020-0363-MU (1/5/2021)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to issue Grievant an oral warning.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent as a Supervisor of Grounds. Grievant challenges a disciplinary action in the form of an oral warning. As a result of a disagreement over where motorcycles could be parked, and with whom this decision rests, Grievant became upset. Grievant's supervisor observed the outburst. As a result of this and another incident earlier in the day, his supervisor filed the Performance Counseling Statement containing the oral warning. Grievant established a prima facie claim of retaliation; however, Respondent established a non-retaliatory motive. Respondent established that it was appropriate for a supervisor to intercede when an employee is using inappropriate language or is otherwise failing to properly address a tense situation. This grievance is denied.

**TOPICAL INDEX**  
**COUNTY BOARDS OF EDUCATION**  
**PROFESSIONAL PERSONNEL**

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<b><u>KEYWORDS:</u></b>	Termination; Job Duties; Insubordination; Employee Code of Conduct; Willful Neglect of Duty; Mitigation
<b><u>CASE STYLE:</u></b>	<u>Colley v. Logan County Board of Education</u>  DOCKET NO. 2020-1074-LogED (1/8/2021)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent had good cause to terminate Grievant.
<b><u>SUMMARY:</u></b>	Grievant was suspended and terminated from her employment as a school nurse for her failure to adequately perform her duties. Grievant, in her filing, denied all the allegations but through her testimony admitted she repeatedly did not supervise, monitor, document or follow the care plan and physician orders for a highlighted student. Grievant argued that her penalty was too severe and that she should have been provided an opportunity to improve. Respondent maintains that Grievant's conduct amounted to willful neglect of duty and insubordination but nevertheless was an inexcusable failure to perform work-related responsibilities. Respondent maintains it is within its discretion to terminate Grievant's employment without an additional improvement plan or opportunity to improve. By a preponderance of the evidence, Respondent established justification for the disciplinary actions taken. This grievance is denied.

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<b><u>KEYWORDS:</u></b>	Job Responsibilities; Experience Credit; Discrimination
<b><u>CASE STYLE:</u></b>	<u>O'Dell v. Nicholas County Board of Education</u>  DOCKET NO. 2020-0671-NicED (1/8/2021)
<b><u>PRIMARY ISSUES:</u></b>	Whether Grievant proved facts necessary to provide a remedy.
<b><u>SUMMARY:</u></b>	Grievant is employed by Respondent as a career and technical education teacher. Upon his hire, Grievant was given years of experience credit on the state minimum salary schedule for industry work experience capped at eight years pursuant to Respondent's policy. A newly-hired employee, who previously worked for another county board of education, received uncapped industry experience based on Respondent's practice of accepting the years of experience reported from another county board of education without application of its own policy. This practice constitutes discrimination and favoritism, however, Grievant failed to prove facts necessary to provide a remedy. Accordingly, the grievance is denied.

**KEYWORDS:** Suspension; Misconduct; Physical Interaction with Students; Insubordination

**CASE STYLE:** Lindamood v. Wood County Board of Education

DOCKET NO. 2020-1531-WooED (1/13/2021)

**PRIMARY ISSUES:** Whether the levied discipline is proper.

**SUMMARY:** Grievant is a duly licensed teacher of Wood County Board of Education with identified restrictions regarding his physical interactions with students. Grievant argues the instant disciplinary action was gratuitous and excessive action. Respondent maintains it is within its authority to sanction Grievant for his imprudent physical contact with a female student after being told on previous occasions not to have physical contact with students. Grievant was not sanctioned or found to be guilty of kissing a student. Respondent maintains Grievant's conduct was insubordinate after being given ample opportunity to correct his physical contact with (touching of) students.

Respondent establishes Grievant's action was ill-advised and constitutes a violation of a known and acknowledged directive. Respondent established lawful justification for sanctioning Grievant. As a matter of law, Grievant was insubordinate. The levied sanction (100-day suspension) is harsh but within the purview of the agency. This instant Administrative Law Judge recognizes and grasps Grievant's plight and communicated incense however doesn't feel empowered within the totality of this matter to second guess Respondent's analysis (disciplinary action) and mitigate the sanction reached by the collective insight of the Wood County Board of Education. This grievance is DENIED.

**KEYWORDS:** Performance Evaluation; Unsatisfactory; Professional Conduct; Policy and Procedure; Employee Code of Conduct; Discrimination; Harassment; Hostile Work Environment; Arbitrary and Capricious

**CASE STYLE:** Redd v. McDowell County Board of Education

DOCKET NO. 2019-1849-McdED (1/19/2021)

**PRIMARY ISSUES:** Whether Grievant proved that Respondent subjected her to harassment or a hostile work environment.

**SUMMARY:** Grievant has been employed as a teacher by Respondent, McDowell County Board of Education, for 35 years. After a parent complained that Grievant publicly criticized students during an awards assembly, Respondent did not discipline Grievant but addressed the incident through her year-end evaluation. Grievant challenges the negative reviews on her evaluation and claims a lack of due process, discrimination, harassment, retaliation, and violations of various laws and policies. Grievant failed to prove any of her claims. Accordingly, this grievance is DENIED.

**TOPICAL INDEX**  
**STATE EMPLOYEES**

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<b><u>KEYWORDS:</u></b>	Termination; Gross Misconduct; Graduation Photo; Nazi Salute; Discrimination; Mitigation
<b><u>CASE STYLE:</u></b>	<u>Daniels-Watts v. Division of Corrections and Rehabilitation/West Virginia Corrections Academy</u> DOCKET NO. 2020-0715-MAPS (1/27/2021)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved that Grievant committed gross misconduct and that it was justified in terminating her employment.
<b><u>SUMMARY:</u></b>	Grievant was employed by the Division of Corrections and Rehabilitation (DCR) as a supervising officer at the Corrections Academy when a graduation photo was taken of Class 18 cadets performing a Nazi salute. Grievant saw the photo on the desk of a subordinate but failed to stop its dissemination. Grievant was summarily dismissed. DCR alleged but did not prove that Grievant directed the inclusion of the photo in graduation packets, that she failed to promptly report the photo in violation of the Workplace Harassment Policy, or that she was duty bound to immediately reprimand participants. DCR did prove that Grievant carelessly failed to stop the photo from being disseminated and that this was gross misconduct resulting from reckless disregard of proper standards. Grievant did not prove discrimination, lack of due process, or that her punishment was excessive. Accordingly, the grievance is DENIED.

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<b><u>KEYWORDS:</u></b>	Termination; Resident Abuse; Improper Restraint; Misconduct; Policy Violation; Mitigation
<b><u>CASE STYLE:</u></b>	<u>Kapp v. Department of Health and Human Resources/Lakin Hospital</u> DOCKET NO. 2020-1015-DHHR (1/15/2021)
<b><u>PRIMARY ISSUES:</u></b>	Whether Respondent proved it had good cause to terminate Grievant for his abuse and neglect of a resident and violation of policy.
<b><u>SUMMARY:</u></b>	Grievant was employed by Respondent as a Licensed Practical Nurse at Lakin Hospital and had been so employed for seventeen years. Respondent terminated Grievant's employment for resident abuse and violation of federal regulations. Respondent proved Grievant improperly restrained a resident and forced him to take medication, contributed to a resident's fall, failed to assess or aid the resident after the fall, failed to report the fall, and attempted to conceal that a fall had occurred. Grievant failed to prove mitigation of the punishment is warranted. Accordingly, the grievance is denied.

**KEYWORDS:** Pay Plan Policy; Internal Equity Pay Increase; Equal Work for Equal Pay; Arbitrary and Capricious

**CASE STYLE:** Kerns v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital AND Division of Personnel  
DOCKET NO. 2019-1356-DHHR (1/19/2021)

**PRIMARY ISSUES:** Whether Grievant proved that he is entitled to a salary increase or that Respondent's decision not to seek an "Internal Equity" pay raise on his behalf was arbitrary and capricious.

**SUMMARY:** Grievant has been employed by DHHR/Sharpe and is classified as an Electrician. Grievant seeks an "Internal Equity" pay increase and points to a pay disparity of more than 20% between himself and other State employees classified as Electricians. DHHR counters that it only requests an "Internal Equity" pay increase from DOP if there is at least a 20% pay disparity between DHHR positions with the same classification. Grievant did not prove a 20% pay disparity between any Electrician positions at DHHR. Accordingly, this grievance is DENIED.

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**KEYWORDS:** Motion to Dismiss; Relief; Moot

**CASE STYLE:** Kouns v. Department of Health and Human Resources/Mildred Mitchell-Bateman Hospital  
DOCKET NO. 2019-1552-CONS (1/25/2021)

**PRIMARY ISSUES:** Whether this grievance must be dismissed as the relief requested is wholly unavailable and whether this grievance is moot.

**SUMMARY:** Grievant was employed by Respondent as a Health Service Worker. Grievant has now resigned from employment. Respondent moved to dismiss the grievance as moot. As Grievant is retired, he is no longer subject to the conditions of employment he grieved and has been paid for the suspensions he grieved. All grievance claims are either moot or request relief wholly unavailable from the Grievance Board. Accordingly, the grievance is dismissed.

**KEYWORDS:** Termination; Policy Violation; Misconduct; Use of Force; Physical Assault of an Inmate; Mitigation

**CASE STYLE:** Smith v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails  
DOCKET NO. 2020-0541-MAPS (1/20/2021)

**PRIMARY ISSUES:** Whether Respondent had good cause to terminate Grievant.

**SUMMARY:** Grievant, a Correctional Officer 5 with the rank of Lieutenant, was dismissed from employment for violations of DC&R policies resulting from twice striking a shackled and defenseless inmate in the face with no physical provocation. Grievant admitted to the misconduct but argues that the dismissal is too severe due to his long successful employment history, and his immediately self-reporting of the misconduct, and other employees receiving a lesser penalty for similar infractions. Respondent proved that mitigation was not justified because of the heinous nature of Grievant's action and, as a high-ranking supervisor, he was expected to be a role model and therefore held to a higher standard than subordinate officers.



**KEYWORDS:** Suspension; Termination; Treats of Violence; Misconduct; Policy Violation; Right to Representation; Mitigation

**CASE STYLE:** Vickers v. Division of Highways  
DOCKET NO. 2020-0581-CONS (1/20/2021)

**PRIMARY ISSUES:** Whether Respondent abused its discretion in the suspension and subsequent termination of Grievant's employment.

**SUMMARY:** Grievant was suspended during Respondent's investigation of alleged threats of violence communicated by Grievant toward agency personnel. Grievant was informed that cooperation with the investigation was a condition of his employment. Grievant was subsequently dismissed from employment. Grievant denies making threatening statements and argues Respondent violated his right to representation. Grievant further contends the penalty of termination was excessive and disproportionate for the alleged offense(s). Respondent maintains Grievant's suspension and subsequent termination were appropriate in response to Grievant's violations of DOH's Standards of Work Performance and Conduct.

Determining the proper disposition of this matter is complicated and not necessarily easily discerned. Compelling procedure and rights intermingle throughout. Both parties bear some responsibility for the status of this grievance matter. Respondent and Grievant needed to be more aware of the others concerns. Nevertheless, Respondent established by a preponderance of the evidence reasonable justification for sanctioning Grievant. The severity of Grievant's conduct is within the recognized purview this employing agency. Sufficient mitigating factors are not found present in the instant matter to mandate overriding the disciplinary action of Respondent. In the circumstances of this matter Grievant did not demonstrate that the penalty imposed was an abuse of discretion. This grievance is DENIED.

**KEYWORDS:** Motion to Dismiss; Untimely Filing; Time Limits

**CASE STYLE:** Waybright v. Department of Health and Human Resources/William R. Sharpe, Jr. Hospital AND Division of Personnel  
DOCKET NO. 2018-1352-DHHR (1/19/2021)

**PRIMARY ISSUES:** Whether Respondent proved that this grievance was not timely filed.

**SUMMARY:** Grievant accepted a Health Service Trainee (HST) position at Sharpe Hospital on March 24, 2017 and began her employment as an HST on June 1, 2017. Grievant advanced to a Health Service Worker (HSW) position on March 31, 2018. She laments not being advanced to an HSW position sooner. The employer moved to dismiss the grievance for untimely filing. Grievant failed to respond. Grievant should have filed her grievance within 15 working days of March 31, 2018 but waited another two months until June 21, 2018 to file. Accordingly, the grievance is Dismissed.

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**KEYWORDS:** Classification; Minimum Qualifications; Class Specifications Backpay; Arbitrary and Capricious

**CASE STYLE:** Winans v. Division of Corrections and Rehabilitation/Bureau of Prisons and Jails  
DOCKET NO. 2019-1630-MAPS (1/28/2021)

**PRIMARY ISSUES:** Whether Grievant proved that DOP's initial interpretation of its policy was arbitrary and capricious or that he was entitled to back pay prior to his promotion.

**SUMMARY:** Grievant is employed by the Division of Corrections and Rehabilitation (DCR) and was so employed when he was selected for an Investigator 2 position. The Division of Personnel (DOP) and DCR subsequently determined that Grievant was unqualified because he did not meet the minimum qualifications of the position. DOP's policy then in effect did not allow for consideration of prior non-primary duties in determining the qualifications of an applicant. A year later, DOP's new Director implemented a policy change allowing the consideration of Grievant's prior non-primary investigative duties and approving Grievant for the Investigator 2 position. Grievant requests backpay to the original selection date, arguing that the initial refusal to consider his prior non-primary duties was arbitrary and capricious. Grievant did not prove that DOP's policy prohibiting the consideration of prior non-primary duties was unreasonable. He did not prove he was entitled to backpay prior to his promotion or prior to the policy change by DOP. Accordingly, the grievance is DENIED.